No. 89-5809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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This Court's decisions in *Butler* v. *McKellar*, ___ U.S. ___, 58 U.S.L.W. 4294 (U.S. March 5, 1990) and *Saffle* v. *Parks*, ___ U.S. ___, 58 U.S.L.W. 4322 (U.S. March 5, 1990) were handed down on the same day that the Brief for Petitioner was served on the State and mailed to the Court. Both cases are treated here, because they create doctrine that relates directly to the disposition of the first Question Presented in Robert Sawyer's case concerning the retroactivity of *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985). Respondent relies heavily on *Butler* and *Parks*, but overlooks their actual analysis of the methodology to be used in resolving "new law" questions under *Teague* v. *Lane*, 489 U.S. ___, 109 S. Ct. 1060 (1989). *See* Brief for Respondent at 8, 9, 13-16, 27-29.

Butler and *Parks* support Robert Sawyer's position that *Caldwell* is "old law" and thus should be applied retroactively to his case under *Teague*. Given the uniform state court consensus that approved the *Caldwell* rule, there is no evidence either that reasonable state courts rejected the rule or that they believed *Caldwell*'s outcome was "susceptible to debate" before *Caldwell*. *Butler*, *id.* at 4297. Moreover, Eighth Amendment precedents supported the state court consensus favoring the *Caldwell* rule. Thus under *Butler* and *Parks* there is no evidence that a logical reading of the precedents could have supported a result opposed to *Caldwell*. *See Butler*, *id.*; *Parks*, *id.* at 4322, 4324.

Butler and *Parks* also show that *Caldwell* is not disqualified from treatment as a rule falling within *Teague*'s fundamental fairness exception to the non-retroactivity principle. Unlike rights whose enforcement may decrease the likelihood of obtaining accurate convictions or sentences, the *Caldwell* right is one whose enforcement can

only work to preserve the accuracy of verdicts in the death sentencing process. *Cf. Butler, id.* at 4297; *Parks, id.* at 4325.

In assessing the proper status of *Caldwell* under *Teague*, Respondent urges this Court to disregard the state court adoptions of *Caldwell* in the pre-*Caldwell* era; Respondent also argues that *Caldwell*'s correction standard should be modified. *See* Brief for Respondent at 19, 31-44. Both of these arguments should be rejected, because they are not supported by the relevant authorities and because they would contravene the teachings of both *Teague* and *Caldwell*.

I. UNDER THE TWO-STEP INQUIRY OF *BUTLER* AND *PARKS*, *CALDWELL* IS RETROACTIVE OLD LAW BECAUSE IT WAS ANTICIPATED BY REASONABLE STATE COURTS AND BECAUSE EIGHTH AMENDMENT PRECEDENTS COULD BE READ ONLY TO SUPPORT THE *CALDWELL* RULE.

A. The State Court Rulings Endorsing the *Caldwell* Rule Show That State Courts Reasonably Would Have Regarded *Caldwell* As Old Law.

Butler and *Parks* dictate that the search for evidence of the "new law" status of a constitutional rule should focus on two sources: the state court rulings that precede this Court's adoption of the rule and the precedents that informed those state court rulings. *See Butler*, 58 U.S.L.W. at 4296-4297; *Parks*, 58 U.S.L.W. at 4323-4324. *Butler* and *Parks* examine state rulings as the first step of a *Teague* "new law" inquiry, and find that two typical state patterns supply helpful, though not determinative, evidence that a rule is "new law"—namely, state rejection of a rule, or a division among courts over the endorsement of a rule. *See Butler, id.* at 4297 (describing division over adoption of rule); *Parks, id.* at 4323 (describing rejection

of rule); *id.* at 4325 n.2 (Brennan, J., dissenting) (noting some division over rejected rule).

By contrast, evidence of the "old law" status of a rule is demonstrated in two ways when state courts endorse it, as in the case of the state court adoptions of the *Caldwell* rule before *Caldwell*. *See* Brief for Petitioner at 18-22 & nn. 4, 6; *id.* at 34-35 n.13. A strong state consensus approving a rule shows that state courts would have regarded that rule as dictated by the precedents before it was adopted by this Court. Such a consensus also shows that state courts would have assumed that the rule would be retroactive once ratified by this Court.

Therefore, the evidence of *Caldwell*'s endorsement by state courts should produce the opposite conclusion from that reached in *Butler* and *Parks*, where reasonable state rejections of constitutional rules justified the finding that those rules were "new law" under *Teague*. *See Butler, id.* at 4297 (relying on state division over rule adopted in *Arizona* v. *Roberson*, 486 U.S. 675 (1988)); *Parks, id.* at 4323 (relying on state rejections of claim made by Parks). In *Butler* and *Parks*, retroactive application of unpredictable rules was rejected because it would have no deterrent value. The *Caldwell* rule, however, was predicted by state courts, and its retroactive application is needed in order to affirm the role of habeas review as an incentive for state courts "to conduct their proceedings in a manner consistent with established constitutional principles." *Teague*, 109 S. Ct. at 1073 (cited in *Butler, id.* at 4296 and *Parks, id.* at 4323).

The one-sided pattern of state court acceptance of the *Caldwell* rule shows that state courts before *Caldwell* would have had no trouble discerning the constitutional support for a ban on false and misleading prosecutorial

argument about the jury's role as the final arbiter of death. As determined by *Butler* and *Parks*, state rulings are relevant to the *Teague* inquiry because they reveal the state courts' perspective on the constitutional standards of a particular era. State rulings can also show whether particular rules were rejected as unjustifiable "new" extensions of existing standards or accepted as predictable "old" applications of such standards. *Cf. Butler, id.* at 4296; *Parks, id.* at 4323 (*Teague* validates "reasonable, good-faith interpretations of existing precedents made by state courts"). When state courts approved the *Caldwell* rule, their consensus provided evidence that *Caldwell* was dictated by existing constitutional principles, as a necessary safeguard for the accuracy of death verdicts.

The states' endorsement of the *Caldwell* rule should be treated as particularly weighty evidence of its old law status because a pattern of consensus is hard to come by in the realm of constitutional interpretation. Reasonable state rejections of rules may signify that precedents either are in conflict or provide no direct guidance on a question. *Compare Butler, id.* at 4297 (where precedents concerning the *Roberson* rule could be interpreted differently) *with Parks, id.* at 4323-4324 (where precedents did not speak directly to the rule at issue). But state rejections of rules may also simply reflect the fact that existing constitutional standards are somewhat unclear, as is often the case. *See Butler, id.* at 4296 (state courts sometimes have difficulty ascertaining evolving constitutional standards, citing *Teague*, 109 S. Ct. at 1075, citing *Brown* v. *Allen*, 344 U.S. 443, 534 (1953) (Jackson, J., concurring in result)). Thus when state courts join together to support a rule, their agreement must be impelled by the confidence that the relevant standards are especially clear in supporting that rule.

The state consensus endorsing the *Caldwell* rule not only demonstrates that state courts would have regarded that rule as dictated by the precedents, but also provides evidence of the old law status of *Caldwell* in a second way. *Teague*'s non-retroactivity principle is based on the premise that state courts interpret constitutional standards with habeas review in mind. *See Butler, id.* at 4296 *and Parks, id.* at 4323. In faithfully applying those standards, state courts assume that retroactive treatment will be given to rules that are required by those standards, once those rules are ratified by this Court. Thus state court endorsements of rules are made with the expectation that the endorsed rules will be retroactive, while state rejections of rules are made with the opposite expectations. *Cf. Butler, id.* When state courts joined together to endorse the *Caldwell* rule, their consensus reflected an expectation that *Caldwell* would become part of the constitutional *status quo*, and as such, applied retroactively.

No doubts can be raised about the efficacy of the incentive that is created by retroactive usage of the *Caldwell* rule, because that rule was widely accepted by state courts that addressed the *Caldwell* problem. Where state rejections of rules reveal that Supreme Court ratification of those rules was unpredictable at best, this suggests that retroactive usage of the rules can create no deterrent effect, because state courts cannot be expected to conduct their proceedings in a manner consistent with unpredictable constitutional developments. *See Butler, id.* at 4296 (citing *United States* v. *Leon*, 468 U.S. 897, 918-919 (1984)). Yet where state court endorsement of rules occurs, the opposite should be true—the state courts can be expected to respond to the incentive provided by retroactive usage of those rules.

The state rulings endorsing the *Caldwell* rule provide clear evidence that the state courts did respond to the

incentive of this Court's predictable ratification of the *Caldwell* rule and to the prospect of its retroactive usage. There are no reasonable, good-faith, pre-*Caldwell* state court rejections of the *Caldwell* rule that require "validation" through non-retroactive treatment of *Caldwell*. *See Butler, id.* at 4296 *and Parks, id.* at 4323. The first step of the *Teague* "new law" inquiry must lead to the conclusion that the state court rulings preceding this Court's adoption of *Caldwell* support Robert Sawyer's argument that the *Caldwell* rule is old law.

B. This Court's Eighth Amendment Precedents Could Be Read Only To Support The Adoption Of The *Caldwell* Rule, And Reasonable State Courts Would Have Regarded *Caldwell* As Compelled By Those Precedents.

Under the second step of a *Teague* "new law" inquiry, *Butler* and *Parks* dictate an examination of this Court's Eighth Amendment precedents, in order to determine whether they provide independent evidence that *Caldwell* was old law. *See Butler*, 58 U.S.L.W. at 4296-4297; *Parks*, 58 U.S.L.W. at 4323-4324. *Accord, Penry* v. *Lynaugh*, 489 U.S. ___, 109 S.Ct. 2934, 2944-2947 (1989). The Eighth Amendment precedents that produced *Caldwell* do satisfy the functional test for old law rules, as state courts "would have felt compelled by existing precedent to conclude" that *Caldwell* was constitutionally required. *Parks, id.* at 4323.

This Court's Eighth Amendment precedents demonstrate that *Caldwell* is a model of an old rule that predictably extended the reasoning of prior cases. *See Butler, id.* at 4296 *and Parks, id.* at 4323 (noting that there is no bright-line boundary between old law rules that predictably "extend the reasoning of prior cases" and new law rules that do so in a way that disqualifies them for retroactive usage). Specifically, the *Caldwell* precedents contain two ingredients that are vital to show that a rule is old law under *Butler* and *Parks*. First, *Caldwell*'s precedents cannot be read to support the opposite result from that reached in *Caldwell*. Second, the precedents provided guidance concerning the *Caldwell* problem by speaking directly to the constitutional vice that the *Caldwell* rule seeks to correct.

In order to understand why *Caldwell*'s precedents could not be read to produce the opposite result, and why this shows that *Caldwell* was old law, the *Caldwell* precedents must be compared to those underlying the *Roberson* rule. That rule was held in *Butler* to be new law, in part, because its precedents looked in two directions. *See Butler, id.* at 4297 (where precedents can support two results, the rule is susceptible to debate among reasonable minds and is new law). *Roberson* created a *per se* rule about Fifth Amendment waivers that was exceptional compared to the ordinary case-by-case approach applied everywhere but in the specific circumstances defined by *Edwards* v. *Arizona*, 451 U.S. 477 (1981). *Compare Roberson*, 486 U.S. at 680-688 *with id.* at 689-693 (Kennedy, J., dissenting). *Edwards* lent itself to competing interpretations, as evidenced by the deep state court division over the implications of its holding. *See* cases cited in *Roberson*, 486 U.S. at 679-680 n.3. State courts also perceived the Supreme Court's case-by-case waiver holdings as signalling the need to reject *Roberson*'s *per se* approach. *See id. Cf. Solem* v. *Stumes*, 465 U.S. 638, 647-650 (1984) (finding *Edwards* to be new law based, in part, on state court division over its necessity).

By contrast, the *Caldwell* precedents contain no contradictory signals that could have supported the state courts' rejection of the *Caldwell* rule, and the state court

decisions on the *Caldwell* problem bear this out. *See* Brief for Petitioner at 18-22 & nn. 4 & 6. State courts did not find, in the pre-*Caldwell* era, that any Eighth Amendment precedent signalled the need to reject *Caldwell*, or even that *Caldwell* was debatable under the precedents. This result is not surprising, considering the consistent pattern of reasoning in a variety of Eighth Amendment cases supporting the *Caldwell* result. *See* Brief for Petitioner at 12-29. Under *Butler*, *Caldwell*'s retroactive usage is needed because the *Teague* "incentive" does operate upon state courts when rules are compelled by precedents that consistently point toward the necessity for a particular rule. *See Butler*, *id.* at 4296 (*Teague* hold that the scope of the new law concept should be defined by references to policies such as the incentive function of habeas).

Caldwell's precedents also provided the guidance necessary under *Parks* to show state courts that the *Caldwell* rule should be adopted. *See Parks*, *id.* at 4323-4324 (when precedents do not "speak directly, if at all" to a claim, it is new law.) The *Parks* Court found that precedents could not provide clear guidance for state courts faced with a claim that a *per se* ban on the anti-sympathy instruction was necessary under the Eighth Amendment. *See Parks*, *id.* at 4323-4324 (analyzing *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982)). *Parks* presented a problem concerning the jury's discretion in weighing evidence, not the problem of preclusion of the jury's power to consider mitigating evidence that is governed by *Lockett* and *Eddings*. *Parks*, *id.* at 4323, 4324. In addition, the *Parks* claim conflicted with precedents concerning both "weighing" problems and the need to curb the vagaries of emotional juror responses to evidence. *Id.* at 4324. Depending on their view of the law,

state courts could conclude either that, as in *Butler*, there were conflicting signals in the precedents, or that the precedents left them entirely in the dark. *See* state cases cited in *Parks*, *id.* at 4323 (where most state courts reached one of these two conclusions).

The *Caldwell* precedents did not leave the state courts in the dark concerning the need for the *Caldwell* rule as a matter of Eighth Amendment law. These precedents were free of contradictory signals, and two sets of principles spoke directly to the *Caldwell* problem. The *Caldwell* problem presented the question whether false and misleading information could be presented safely to a sentencing jury, when this not only affronted the jury's need for reliable sentencing information, but created the risk that the jurors would not consider mitigating evidence because they had been misinformed that this responsibility could be abdicated to an appellate court. The rulings in *Gardner* v. *Florida*, 430 U.S. 349 (1977), *California* v. *Ramos*, 463 U.S. 992 (1983) and *Zant* v. *Stephens*, 462 U.S. 862 (1983), as well as *Lockett* and *Eddings*, spoke directly to this question. *See* Brief for Petitioner at 12-29.

As *Parks* points out, *Penry* demonstrates that state courts are expected to read Eighth Amendment precedents together, to construct the clear connections that lie between them, and to understand the clear implications that follow from their reasoning, even though the principles they establish may be created in a piecemeal fashion. *See Parks*, *id.* at 4324 (reasonable state courts should have understood that *Lockett* and *Eddings* reaffirmed the reasoning of *Jurek* v. *Texas*, 428 U.S. 262 (1976), and should have connected all three cases together as compelling the *Penry* result). The *Caldwell* precedents created a connected foundation for the *Caldwell* rule, which reason-

able state courts would have regarded as evidence that the rule was compelled by the precedents. The actual state court endorsement of the *Caldwell* rule shows that these courts found no ingredient in the precedents that justified rejection of, or even doubt about, the necessity for the rule.

Under *Parks* and *Butler*, *Caldwell* is old law because reasonable state courts would have regarded it as compelled by the precedents under *Teague*. Retroactive usage of *Caldwell* will serve *Teague*'s guarantee that habeas review will insure that state courts conduct their proceedings in accordance with old law rulings that interpret the Constitution in highly predictable and reasonable ways.

C. When State Court Decisions Endorsing *Caldwell* Are Based On Federal Law Or On State Law That Is Informed By Federal Principles, Those State Decisions Are Relevant Evidence That *Caldwell* Is Old Law Under *Teague*.

Teague dictates that the state courts' perspective must be used to determine whether a rule was compelled by federal precedents, and this means that traditional sources of federal law interpretation used by state courts must be considered in determining whether state courts reasonably would have regarded *Caldwell* as old law. In the pre-*Caldwell* era, state courts faced with the *Caldwell* problem would have relied on all the state court decisions endorsing *Caldwell* that were based on federal law or on state law that was informed by federal principles. Therefore Respondent is wrong to argue that state court endorsements of *Caldwell* are irrelevant to the *Teague* inquiry because they rely on "jurisprudential developments on the state level." Brief for Respondent at 19.

The reasoning used in the state court decisions adopting *Caldwell* reveals the use of federal principles combined with the principles developed in the pre-*Furman* era, when it was the state courts who were the chief guarantors of due process rights in the capital trial process. *Furman* v. *Georgia*, 408 U.S. 238 (1972). After *Furman*, this earlier body of principles remained a natural source of first resort for state courts who were charged with the responsibility of developing procedures to curb the arbitrary infliction of the death penalty. Not surprisingly, *Caldwell* adoptions in Georgia and Louisiana after *Furman* reflected the use of earlier state court principles, as well as the Eighth Amendment principle approving the appellate review of death verdicts in order to reverse those that were influenced by arbitrary factors. *See Gregg* v. *Georgia*, 428 U.S. 153 (1976). The pre-*Furman* state court consensus held that *Caldwell* violations created unreliable death verdicts by lessening the jury's sense of responsibility for the finality of its verdict.

There was a rich variety of sources supporting adoption of the *Caldwell* doctrine, as illustrated in the opinions of state courts that adopted the *Caldwell* rule as part of their Eighth Amendment review of death verdicts for arbitrary factors. *See Hawes* v. *State*, 240 Ga. 327, 240 S.E.2d 833, 839 (1977), *and Fleming v.* State, 240 Ga. 142, 240 S.E.2d 37, 40 (1977), *cert. denied*, 444 U.S. 885 (1979) (relying on *Prevatte* v. *State*, 233 Ga. 929, 214 S.E.2d 365, 367-368 (1975), which borrowed the *Caldwell* rule from A.B.A. Standards, early Georgia precedents, and the pre-*Furman* death penalty law of other states); *see State* v. *Willie*, 410 So.2d 1019, 1033-1035 (La. 1983), *cert. denied*, 465 U.S. 1051 (1984), *and State* v. *Robinson*, 421 So.2d 299, 233-234 (La. 1982) (relying on *State* v. *Berry*, 391 So.2d 406, 418-421 (La. 1980), *cert. denied*, 451 U.S.

1010 (1981), which borrowed the *Caldwell* rule from post-*Furman* adoptions of *Caldwell* in Georgia, North Carolina, and South Carolina cases, and from the pre-*Furman* death penalty law of other states).

In turn, these state court opinions spawned further state adoptions of *Caldwell*. *See, e.g., Ice* v. *Commonwealth*, 667 S.W.2d 671, 676 (Ky.) *cert. denied*, 469 U.S. 860 (1984) (relying on Louisiana's *Willie* and Kentucky precedent), *and Ward* v. *Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985) (relying on Georgia's *Hawes*, Louisiana's *Willie*, and post-*Furman* South Carolina adoptions of *Caldwell*); *see State* v. *Gilbert*, 273 S.C. 690, 258 S.E.2d 890, 894 (1979) (relying on Georgia's *Hawes*, *Fleming* and *Prevatte*, and on pre-*Furman* death penalty law of other states), *and State* v. *Tyner*, 273 S.C. 646, 258 S.E.2d 559, 566 (1979) (relying on same sources). *See also Poole* v. *State*, 290 Md. 114, 48 A.2d 434 (Ct. App. 1981) (approving *Caldwell* rule in dicta for use in future cases, relying on Louisiana's *Berry*, South Carolina's *Gilbert*, post-*Furman* adoption of *Caldwell* in North Carolina, and Maryland precedent); *Irvin* v. *State*, 617 P.2d 588, 599 (Okla. Ct. Crim. App. 1980) (approving *Caldwell* in dicta relying on Georgia's *Prevatte*).

As this Court's precedents dictating acceptance of the *Caldwell* rule continued to accumulate, state courts could make use of more Eighth Amendment law in adopting *Caldwell*. *See Williams* v. *State*, 445 So.2d 798, 811-812 (Miss. 1984), *cert. denied*, 469 U.S. 1117 (1985) (relying on *Ramos* to find that information about appellate review must be accurate, on post-*Furman* Mississippi adoption of *Caldwell*, and pre-*Furman* Mississippi precedent). *Cf.* Brief for Petitioner at 12-29 (describing the accumulating federal precedents that dictated the *Caldwell* rule.) State courts that already had adopted *Caldwell* were able to

cite their earlier decisions as precedents for maintaining a rule that enjoyed continuing and undebatable support from evolving federal law. *See, e.g., State* v. *Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981), *cert. denied sub nom. Arnold* v. *South Carolina*, 467 U.S. 1265 (1984) (reversing a death verdict and relying on *post-Furman* South Carolina adoptions of *Caldwell*); *State* v. *Woomer*, 276 S.C. 258, 277 S.E.2d 696, 701-702 (1981), *cert. denied*, 463 U.S. 1225 (1983) (same).

State court usage of the *Caldwell* decision reveals that these courts understood that their pre-*Caldwell* adoptions of the *Caldwell* rule were informed by federal principles. The state courts did not treat the holding as one that surprised them. Those courts that already had adopted the *Caldwell* rule treated this Court's decision as a ratification of the principles they had used to solve the *Caldwell* problem. When *Caldwell* claims arose, the *Caldwell* opinion was cited interchangeably with pre-*Caldwell* state court rulings, and those state rulings remained in use as illustrations of proper Eighth Amendment applications of the *Caldwell* rule. *See. e.g., Dean* v. *Commonwealth*, 777 S.W.2d 900, 906, 907 (Ky. 1989), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1546 (1989) (reversing death verdict for *Caldwell* violation); *Tamme* v. *Commonwealth*, 759 S.W.2d 51, 52 (Ky. 1988) (same); *Holland* v. *Commonwealth*, 703 S.W.2d 876, 880 (Ky. 1985) (same); *State* v. *McCoy*, 323 N.C. 1, 372, S.E.2d 12, 16 (1988), *cert. granted and judgment vacated*, ___ U.S. ___, 1989 WL 115354 (March 26, 1990) (finding no violation); *State* v. *Artis*, 325 N.C. 278, 384 S.E.2d 470, 499 (1989), *cert. granted and judgment vacated*, ___ U.S. ___, 110 S. Ct. 1466 (1990) (same); *Moon* v. *State*, 258 Ga. 748, 375 S.E.2d 442, 450 (1988) (same); *see also* Louisiana cases cited in Brief for Petitioner at 22 n.7. Pre-*Caldwell* state cases

adopting the *Caldwell* rule were even used in states that had been given no occasion to adopt the *Caldwell* rule earlier. *See, e.g., State* v. *Rose*, 112 N.J. 454, 548 A.2d 1058, 1089 (1988) (reversing death verdict for *Caldwell* violation); *Riley* v. *State*, 496 A.2d 997, 1024 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986) (finding no violation).

A reasonable state court would have regarded the pre-*Caldwell* state adoptions of the *Caldwell* rule as helpful sources for interpreting the Eighth Amendment's requirement, because these adoptions were based on federal law and on state law that was informed by federal principles. These state rulings are not grounded in narrow statutory concerns that are unique to particular states. *Compare Ramos*, 463 U.S. at 1013 n.30 (finding that such narrowly-grounded state law holdings do not necessarily inform the making of federal constitutional law). Nor do the state court adoptions of *Caldwell* bear the earmarks of decisions that attempt to guarantee greater protection under state law than is recognized as existing under federal law. Rather, these rulings demonstrate state courts' sensitivity to their obligations to anticipate this Court's Eighth Amendment rulings. Under *Teague*'s "new law" inquiry, these rulings must count as evidence that reasonable state courts would, and did, regard *Caldwell* as old law in the pre-*Caldwell* era.

II. THE *CALDWELL* RULE SHOULD BE RETROACTIVE UNDER *BUTLER* AND *PARKS* BECAUSE IT DOES NOT THREATEN THE ACCURACY OF DEATH VERDICTS, AND INSTEAD GUARANTEES THAT THEIR ACCURACY IS NOT DISTORTED BY JURORS' MISUNDERSTANDING OF THEIR ROLE AS THE FINAL ARBITERS OF DEATH.

Butler and *Parks* affirm that *Teague* provides that "new law" rules that qualify under its fundamental fairness

standard will be applied retroactively. *Butler*, 58 U.S.L.W. at 4297; *Parks*, 58 U.S.L.W. at 4325. These decisions also reveal that rules that threaten the accuracy of death verdicts cannot qualify for retroactive application under this *Teague* standard. *Butler, id.* (*Roberson* rule does not qualify for *Teague* exception because its violation does not diminish the likelihood of obtaining accurate convictions); *Parks, id.* (*Parks* rule does not qualify because the accuracy of death sentences is likely to be threatened by its use).

By contrast, violations of the *Caldwell* rule diminish the likelihood of obtaining accurate death sentences, as explained in Petitioner's Brief. *See* Brief for Petitioner at 30-40. As *Parks* notes, the contours of the fundamental fairness exception are illustrated by the examples of the qualifying rights that are cited in *Teague*. *Parks*, id. at 4325. *Caldwell* fits within these contours for all the reasons described in Petitioner's Brief, as it guarantees that the accuracy of death verdicts will not be distorted by jurors' misunderstanding of their role as final arbiters of death.

III. THIS COURT SHOULD NOT ABANDON *CALDWELL*'S CORRECTION STANDARD, WHICH HOLDS THAT WHEN PROSECUTORS VIOLATE *CALDWELL*, THE JURY MUST BE GIVEN INFORMATION THAT CORRECTS THE IMPRESSION THAT THE APPELLATE COURTS WILL BE FREE TO REVERSE THE DEATH SENTENCE IF THEY DISAGREE WITH THE JURY'S CONCLUSION THAT DEATH WAS APPROPRIATE.

Respondent seeks to have this Court modify the correction standard for *Caldwell* violations. This proposal is not supported by persuasive authority, and it is not a good idea. In place of *Caldwell*'s bright-line rule, Respondent

would substitute a test that would make it difficult for lower courts to know when proper correction of a violation occurs. *Caldwell*'s correction standard is being applied correctly by lower courts, and it should be reaffirmed. Relief must be granted in those rare cases where clearly false and misleading statements about the non-finality of the jury's death verdict are made, and where the jury is not given information that will

> correct the impression that [an] appellate court would be free to reverse the death sentence if it disagreed with the jury's conclusion that death was appropriate.

Caldwell, 472 U.S. at 343 (O'Connor, J., concurring). Robert Sawyer should be given a resentencing hearing because his prosecutor's statements in closing argument violated *Caldwell* and because no correction occurred in his case.

Caldwell's correction standard is based on the premise that once a *Caldwell* violation occurs, some express contradiction of the prosecutor's false and misleading statements is needed in order for the capital sentencing jury to understand its responsibilities. The standard for a *Caldwell* violation itself is a demanding one: statements must be "false and misleading", and "focused, unambiguous and strong", and must relate to the power of other authorities to review or correct a jury's death verdict. *See* Brief for Petitioner at 9 (describing relevant *Caldwell* requirements). Once these kinds of false and misleading statements are made, *Caldwell* holds that "other remarks to the effect that the jury [is] responsible for sentencing [cannot] cure the prejudicial effect of [a] prosecutor's improper argument." *Frye* v. *Commonwealth*, 231 Va. 370, 345 S.E.2d 267, 286 (1986). Respondent offers examples of these kinds of insufficient remarks to show that

Caldwell's correction standard is satisfied. *See* Brief for Respondent at 33-37 & Appendix B and C. In effect, Respondent would have this Court modify *Caldwell*'s correction standard.

The authorities cited by Respondent do not support the proposition that general remarks about the jury's responsibility should be held to cure a *Caldwell* violation. This Court has been careful to distinguish the *Caldwell* doctrine from that used to assess generic prosecutorial mistakes. *See Darden* v. *Wainwright*, 477 U.S. 168, 183-184 n.15 (1986). *Cf. Boyde* v. *California*, ___ U.S. ___, 58 U.S.L.W. 4301, 4305-4306 (March 5, 1990) (relying on *Darden* standard); *Tucker* v. *Kemp*, 802 F.2d 1293 (11th Cir. 1986) (*en banc*), *cert. denied*, 480 U.S. 911 (1987) (relying on *Darden* standard in a case involving *Darden* error that is mislabelled as *Caldwell* error). *See* Brief for Respondent at 31-32, 38-40, 42 (arguing that *Boyde*, *Tucker* and *Darden* standards should be used as the *Caldwell* correction standard).

This Court should retain the *Caldwell* correction standard because a more lenient standard was properly rejected in *Caldwell*, as such a standard would not require express contradiction of the false and misleading statements made to the jury about appellate court powers. Moreover, the *Caldwell* correction standard is a straightforward one, and is being applied correctly by the lower courts. *See, e.g., People* v. *Drake*, 748 P.2d 1237, 1258-1260 (Colo. 1988) (granting *Caldwell* relief); *Frye* v. *Commonwealth*, 231 Va. 201, 345 S.E.2d 267, 286 (1986) (same); *State* v. *Clark*, 492 So.2d 862, 870-871 (La. 1986) (same). *See also* federal cases cited in Brief for Petitioner at 49. The Respondent's proffered correction standard would make it more difficult for lower courts to know when a *Caldwell* error was cured, as long as an unpredic-

table number of general comments about jury responsibility would suffice for correction.

Caldwell was correctly decided and is proving to be easy for lower courts to enforce. There is no need to modify it. Robert Sawyer's prosecutor made false and misleading statements that meet *Caldwell*'s strict standards, and because those statements were not corrected, a resentencing hearing should be granted.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the Brief for Petitioner, the judgment below should be reversed and Petitioner's case should be remanded with instructions to grant the writ of habeas corpus with regard to the provision of a resentencing hearing.

Respectfully submitted,

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